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SUPREME COURT, U.S.

No. 06-1694

IN THE
SUPREME COURT OF THE UNITED STATES

LONNELL BREWER,

Petitioner

v.

BOARD OF TRUSTEES OF THE
UNIVERSITY OF ILLINOIS

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

Brief For Respondent In Opposition To Petition

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's entry of summary judgment denying a student assistant's Title VII race discrimination claim where the undisputed facts in the record showed the decision-maker's decision to terminate the student's assistantship because of misconduct was made after she conducted an independent investigation and concluded the student had dishonestly altered a parking tag and there was no evidence she was biased against the student because of his race.

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The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 479 F.3d 908. The opinion of the district court (Pet. 38a-104a) is reported at 407 F.Supp.2d 946.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2007. This Court has jurisdiction pursuant to 28 U.S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), provides:

It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin[.]

Section 703(m) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or

national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

INTRODUCTION

Petitioner presents no compelling reason for his Petition for a Writ of *Certiorari* ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioner fails to demonstrate that the Seventh Circuit's March 21, 2007 Order ("Order") is in conflict with a decision of this Court or another Court of Appeals, or that the Seventh Circuit decided an important federal question that has not already been settled by this Court. *See id.* at 10(a)-(c). The Petition should therefore be denied.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

I. Background

Petitioner, an African-American, enrolled in the University's Institute of Labor and Industrial Relations (ILIR) master's degree program in August 1997. (App. at 44a). In addition to his class load for the ILIR program, Petitioner worked approximately ten hours at an assistantship in the University's Personnel Services Office ("PSO"). (App. at 44a, 51a).

Denise Hendricks ("Hendricks") was director of the PSO and Kerrin Thompson ("Thompson") was a special assistant to Hendricks. (App. at 51a). Thompson was Petitioner's supervisor only in terms of his hours and overall assignments; however, other people supervised Petitioner's work on particular projects. (App. at 51a).

On the first day of his assistantship, Thompson met with Petitioner and they discussed the requirements of the assistantship, including projects he would be working on, his schedule, and the form of dress expected. (App. at 3a). Thompson also gave Brewer a temporary parking tag, while explaining he "could pretty much park anywhere at the PSO as long as [he] had [his] tag on [his] mirror." (App. at 4a). Without having any permission to do so, Petitioner altered the parking tag, writing "the C8 lot permission on the tag himself." (App. at 10a). The "C8" designation referred to the ILIR, and not the PSO, lot. (App. at 10a).[1] The PSO lot was adjacent to the PSO building, whereas the ILIR lot was approximately six blocks from the PSO building.

During the fall semester, Petitioner worked primarily on one assignment. (App. at 52a). When he was unable to complete the project by his own self-imposed deadline, he contacted supervisor Judy Baker to request an extension. *Id.* While Baker granted an extension, she also told Petitioner that Thompson and Hendricks wanted to talk with him. *Id.* Both Thompson and Hendricks talked to Petitioner about the missed

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[1] On page 7 of his Brief, Petitioner implies that the parking tag given to him by Thompson "purported to grant permission to park in either lot." In fact, it was only after Petitioner himself altered the parking tag without permission that the tag purported to grant such permission.

deadline. *Id.* [2]

In early 1998, Petitioner received a parking ticket because the tag he was using broke and fell off of his rear view mirror. (App. at 10a). Petitioner took the tag to University Parking Services for a replacement. (App. at 10a). The Parking Services' clerk discovered the altered tag, and that the tag contained inaccurate information. (App. at 10a, 54a).

Parking Services subsequently called Thompson to express concern that the tag contained two lot numbers, only one of which it had authorized. (App. at 54a). Thompson told Hendricks what Parking Services told her: (1) that Petitioner had taken his tag to Parking Services to get it replaced; (2) Parking Services saw that it had been marked to add another parking lot in addition to the lot that was printed on the hang tag; and (3) that Parking Services then contacted the PSO to find out why the Petitioner's tag listed two parking lots. (App. at 54a, 57a).

Following this discussion with Thompson, Hendricks herself inspected the tag and verified the addition of the C8 lot number on the tag. (App. at 12a). After this independent investigation, Hendricks decided to terminate Petitioner's assistantship one month early because he had altered the parking tag. (App. at 12a, 57a). Hendricks was the only person that participated in the termination decision; she did not

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[2] Petitioner suggests on page 7 of his brief that "Thompson jeopardized [his] employment by trumpeting to Ms. Hendricks the fact that [he] had missed an important deadline..." In fact, Petitioner testified that "I went to [Thompson] and I believe [Hendricks] both and let them know that I would need a little more time..."

talk to Thompson about whether to discharge Petitioner. (App. at 58a).

Thompson and Petitioner discussed the parking tag alteration the following day. (App. at 11a, 54a-55a). According to Petitioner, Thompson was "irate" because he had altered the parking tag. (App. at 55a). When Petitioner orally "pushed back" Thompson purportedly "mumbled a couple things". (App. at 55a). Continuing in his retort, Petitioner said he "d[id] not have to take this and started to walk off." (App. at 55a). Petitioner did not "even remember exactly what else [Thompson] said", but nonetheless recalled that Thompson said "I am through with you people" (App. at 55a) and referred to Petitioner with a racial epithet. (App. at 11a; Brewer Dep. Ex. 14 at 16-17).

Following the conversation with Thompson, Petitioner spoke with Hendricks. (App. at 11a). Hendricks told Petitioner that "I and I alone have decided to terminate [your] assistantship." (App. at 11a). Petitioner told Hendricks that he "underst[ood] that what [he] did was wrong." (App. at 56a). He also told Hendricks that Thompson gave him permission to park in the ILIR (C8) lot and that Thompson could not be trusted to confirm this because she was racist. (App. at 12a). Hendricks responded that Petitioner "admitted to altering the temporary parking tag, so [she] did not need to know much more." (App. at 56a). Hendricks further explained that although the parking issue did not merit termination in the abstract, someone needed to be fired to preserve the special relationship between the PSO and Parking Services. (App. at 11a).[3]

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[3] Although the University disputes many of Petitioner's factual allegations, it recognizes the Court is required to view all facts and draw all reasonable inferences in favor of the

REASONS FOR DENYING THE PETITION

I. The courts of appeal are not in genuine conflict on the issue of intermediate supervisor liability.

Petitioner contends there is a conflict among the courts of appeals concerning the appropriate standard for intermediate supervisor liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. To support his argument, Petitioner attempts to create a conflict that does not truly exist through the artful selection of language from some cases, while overlooking and disregarding language from the same or other cases within the same jurisdiction. A thorough analysis shows there is no actual conflict among the circuits regarding the standard applied for determining employer liability for a supervisor's discriminatory animus.

This Court, in fact, generally addressed the issue of employer liability for supervisor conduct in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998), a case involving sexual harassment. There, the Court noted that because "the term 'employer' is defined under Title VII to include 'agents'. . . Congress has directed federal courts to interpret Title VII based on agency principles." 524 U.S. at 755. Guided by Restatement (Agency) § 219(2)(d), this Court looked to the "aided in the agency relation standard" and found it requires "something more than the employment relation itself." 524 U.S. 760. The Court found this approach was consistent with "[e]very Federal Court of Appeals to have considered the question" and which "has

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nonmoving party when considering a motion for summary judgment. Except where otherwise indicated, the University therefore will not identify those instances where Mr. Brewer's allegations are disputed by the University.

found vicarious liability when a discriminatory act *results* in a tangible employment action". *Id.* at 760 (emphasis added). Noting that "few courts have elaborated how agency principles support this rule," the Court went on to conclude that it "reflects a correct application of the aided in agency relation standard." *Id.* In further support of its conclusion, the Court cited with approval, the Seventh Circuit "cat's paw" decision of *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (C.A. 7 1990). *Ellerth*, 524 U.S. at 762.

While the lower appellate courts have not always expressed the applicable test in terms of an "aided in agency relation" or "results in" standard, synonymous language, such as "cause" or "influence" has been used. And, irrespective of whether the courts use the terms "cause" or "influence", the determinative issue has been the same - did an act of an unlawfully biased supervisory employee *result in* a tangible employment action.[4] Although Petitioner contends the appellate courts have utilized different standards, the following analysis shows a "results in" approach has been uniformly applied.

For example, in *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 285 (C.A.3 2001), the district court in granting summary judgment relied heavily on the fact that there was no evidence the ultimate decision-maker was biased against the plaintiff. The Third Circuit reversed the district court because, *inter alia*, the decision-maker had asked for, and was provided with, information and recommendations

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[4] The term "cause" is defined to mean "a person that acts ... so as to produce a specific result." WEBSTER'S COLLEGE DICTIONARY 208 (2nd ed. 1998). Similarly, the term "influence" means "to move or impel (a person) to some action." *Id.* at 670.

from biased individuals that "played a role in the ultimate decision to terminate" the plaintiff. *Id.* at 285-86. *See also Delli Santi v. CNA Ins. Co.*, 88 F.3d 192, 201 (C.A.3 1996)(affirming jury verdict because it could have rationally inferred that decision-makers were not the effective decision-makers and that decision to fire plaintiff was influenced by biased supervisors).

A similar "results in" approach was followed by the Fifth Circuit in *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (C.A.5 2000). There, a supervisory non-decision-maker's bias was imputed to the employer because a jury could find the supervisor was "principally responsible" for the plaintiff's termination. *Id.* at 226 (*citing Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). The court "look[ed] to who actually made the decision or *caused* the decision to be made" and whether there was evidence that the supervisor "possessed leverage, or exerted influence, over the titular decision-maker." *Id.* at 227 (emphasis added). Because there was evidence that the non-decision-maker "was the *actual* decision-maker behind [the plaintiff's] firing", the court reversed the district court's entry of judgment as a matter of law. *Id.* at 227, 228 (*citing Reeves*, 120 S.Ct. at 2111)(emphasis in original). *See also Laxton v. Gap Inc.*, 333 F.3d 572, 584 (C.A.5 2003)(finding non-decision-maker supervisor's biased statement could be evidence of discrimination where supervisor issued first warning and was the primary source of information for the second warning and both warnings were considered in determining plaintiff would be terminated under the defendant's "three-strikes-you're-out policy).

The Sixth Circuit is likewise in accord with the "results in" standard. In *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (C.A.6 2001) a shopper accused the defendant of racial discrimination. The court noted that in the employment

context, imputation of a supervisor's animus to the employer could occur when there was evidence the animus was "the cause of the termination or somehow influenced the ultimate decision-maker." *Id.* at 877. Citing *Shager*, 913 F.2d 398 and *Wilson v. Stroh Cos.*, 952 F.2d 942 (C.A. 6 1992), the court described the standard as having a "causal nexus requirement" and found the determinative question was whether there was evidence that "racial animus was the cause of the termination." *Christian*, 252 F.3d at 877-78. Because, "like *Shager*, there [was] evidence that the decisonmaker 'acted as the conduit of the [employee's] prejudice - [her] cat's paw - and that the employee's 'influence may well have been decisive'", the court reversed the district court's grant of summary judgment. *Id.* at 878 (*quoting Shager*, 913 F.2d at 405). *See also Wells v. New Cherokee Corp.*, 58 F.3d 233, 237-238 (C.A.6 1995)(holding employer was liable for non-decision-maker supervisor's animus because he was "meaningfully involved in the decision to terminate an employee", worked closely together and consulted with the decision-maker on employment decisions and acted jointly with the decision-maker in deciding to terminate the plaintiff's employment).

In the Eighth Circuit, vicarious liability for the conduct of a non-decision-maker supervisor has been found where such supervisor "participated in the decisions to suspend and terminate" the plaintiff and there was evidence that the decision-maker was not the "sole relevant decision-maker." *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1323 (C.A.8 1994). *See also Lacks v. Ferguson Reorganized School District R-2,* 147 F.3d 718 (C.A.8 1998)(refusing to find employer liability because there was no evidence the decision-makers were a cat's paw; the biased supervisors did not recommend termination and the decision-makers did not defer to the opinion or judgment of the biased supervisors), *cert. denied*, 526 U.S. 1012 (1998); *Beshears v. Asbill*, 930 F.2d 1348, 1354 (C.A.8 1991)(finding evidence of discrimination

where individuals *responsible* for employments decisions made age-related comments); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1060 (C.A.8 1993)(reasonable jury could have found that biased supervisor used investigator and decision-maker committee as the conduit of his prejudice - "his cat's paw", *citing Shager*, 913 F.2d at 405).

Despite Petitioner's arguments to the contrary, the Ninth Circuit has *not* "taken a different approach altogether" and there is no "discrepancy in the approach[s]" taken in the Ninth Circuit cases cited by Petitioner. *See* Pet. Brief, page 21. In the context of retaliation claims, both *Bergene v. Salt River Project Agr. Improvement and Power Dist.*, 272 F.3d 1136 (C.A.9 2001) and *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061 (C.A.9 2003) have required, as part of a *prima facie* case of retaliation, proof of a causal link between the protected activity and the employer's action. *Bergene*, 272 F.3d at 1141; *Stegall*, 350 F.3d at 1066. And, both courts found such proof when a biased supervisor was involved, and played an influential role, in the employment decision. *Bergene*, 272 F.3d at 1141; *Stegall*, 350 F.3d at 1070 (biased supervisor was adamant to management that plaintiff be fired).

Petitioner erroneously suggests the Eleventh Circuit requires more than "influence" or "causation", citing to *Llampallas v. Mini-Circuits Lab Inc.*, 163 F.3d 1236 (C.A.11 1998), *cert. denied*, 528 U.S. 930 (1999) and *McShane v. Gonzales*, 144 Fed. Appx. 779 (C.A.11 2005). In *Llampallas*, the plaintiff's employment was terminated by a decision-maker and the alleged harasser was a non-decision-maker supervisor. Liability depended upon whether there was evidence the supervisor's "discriminatory animus caused [the decision-maker] to terminate" the plaintiff's employment. 163 F.3d at 1248. The court recognized the causal chain would be broken if the decision-maker "herself evaluat[ed] the employee's situation." *Id.* at 1249 (*citing Shager*, 913 F.2d at 405).

The Eleventh Circuit in *McShane* did not hold, as Petitioner suggests, that "causation is not always enough". Relying on *Llampallas*, that court merely held the causal link could be broken if "the actual decision-maker himself evaluat[es] the employee's situation." *McShane*, 144 F.3d Appx. at 791. *See also Roberts v. Randstad North America, Inc.*, 2007 WL 1433777, p. 5-6 (C.A.11 May 16, 2007)(no liability for non-decision-maker supervisory conduct because decision-maker conducted an independent analysis).

The approach utilized by the District of Columbia Court of Appeals is in accord with the other Circuits. That court in *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. 1998) "join[ed] at least four other circuits", including the Third, Sixth, Seventh, and Eighth Circuit Court of Appeals, in holding "a subordinate's bias relevant" to the discrimination issue under the facts of the case. *Id.* at 1312. There, the biased supervisor was the formal decision-maker's chief source of information, repeatedly urged the decision-maker to terminate the plaintiff, was given the responsibility for training, testing, and evaluating the plaintiff, and was in contact with the decision-maker at every step in the decision-making process. *Id.* at 1311. The decision-maker's dependence on the biased supervisor was heightened by her inability to independently assess the plaintiff's proficiency. Under these facts the court concluded a jury could find the biased supervisor used the decision-maker as a conduit of his prejudice. *Id.*

Petitioner's argument that *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (C.A.4 2004) creates a different standard requiring that "the biased *intermediate supervisor* must take on the persona of the 'functional' or 'actual' decision-maker" (*See* Pet. Brief, page 17) misinterprets that decision. The court in *Hill* repeatedly stated that the allegedly biased person was a safety inspector with *no supervisory or disciplinary authority* over the plaintiff. *See,*

e.g., Hill, 354 F.3d at 282 ("the inspector had no supervisory authority over the mechanics, nor any authority to discipline"); *Id.* at 291 (safety inspector "held no formal disciplinary or supervisory authority over Hill"); *Id.* at 298 (inspector "possessed no supervisory or disciplinary authority over Hill"). Under those facts, the Fourth Circuit "decline[d] to endorse a construction of the discrimination statutes that would allow a biased subordinate who has *no supervisory or disciplinary authority* and who does not make the final or formal employment decision to become a decision-maker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one in the adverse employment decision." *Id.* at 291 (emphasis added). The court went on to affirm summary judgment because the non-biased decsion-makers made an independent investigation of the allegedly biased employee's safety inspection reports and made an independent non-biased decision to terminate the plaintiff. *Id.* at 293-297.

Although Petitioner expressly recognized that employer liability for supervisory and non-supervisory employees may be different because "this [the Brewer] case does not involve the thornier issues of whether and to what extent an employer may be held liable for the discriminatory acts of its non-supervisory employees," he fails to acknowledge that *Hill* is distinguishable on that very ground (*See* Pet. Brief, page 16, fn 10). Petitioner's reliance on *Hill* to create a conflict among the circuits on the issue of vicarious liability for acts of *supervisory* employees is therefore misplaced. In any event, it is clear that the court in *Hill* applied a "results in" approach to employer liability for non-supervisory bias.

The University concedes that the Tenth Circuit Court of Appeals has suggested there is a divide "as to the level of control a biased subordinate must exert over the employment decision" before liability will be found. *Equal Employment*

Opportunity Commission v. BCI Coca-Cola Bottling Company of Los Angeles, 450 F.3d 476, 486 (C.A.10 2006). In *BCI*, the Tenth Circuit stated the Fifth and Seventh Circuit had adopted a "lenient" approach that was at the opposite extreme of the Fourth Circuit's decision in *Hill*. *Id.* at 486. The *BCI* court further suggested that the circuits following this "approach" "improperly eliminate[] a requirement of causation" and impose liability "even where an employer has diligently conducted an independent investigation." *Id.*

The *BCI* court's suggestion that the Fifth Circuit adopted a "lenient" approach in *Russell*, thereby "eliminating a requirement of causation", *BCI*, 450 F.3d at 486, is debatable because the court in *Russell* expressly recognized that it "look[s] to who actually made the decision or *caused* the decision to be made" when determining employer liability for a non-decision-maker supervisor's conduct. *Russell*, 235 F.3d at 227.[5] Citing *Reeves*, the Fifth Circuit affirmed the jury's verdict because it could find the biased supervisor "contributed significantly to the termination decision" and "was "principally responsible for [the plaintiff's] firing." *Id.* at 228.

Equally debatable is the *BCI* court's suggestion that the Fifth and Seventh Circuit's purported adoption of such "lenient" approach improperly "impose[s] liability even where an employer has diligently conducted an independent investigation." These circuits both recognize that a decision-maker's independent investigation breaks any causal link

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[5] The Seventh Circuit has likewise consistently and routinely utilized a causation analysis in determining employer liability for a biased supervisor's conduct. *Shager*, 913 F.2d at 405; *Hunt v. City of Markham, Ill.*, 219 F.3d 649 (C.A.7 2000); *Rozskowiak v. Village of Arlington Heights*, 415 F.3d 608 (C.A.7 2005); *Brewer* (App. at 27a-29a).

between a biased supervisor's conduct and the adverse employment decision. *Long v. Eastfield Coll.*, 88 F.3d 300, 306-07 (C.A. 5 1996); *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 730 (C.A.7 2004); *Wills v. Marion County Auditor's Office*, 118 F.3d 542, 547-48 (C.A.7 1997).

The *BCI* court's further suggestion that the Fifth Circuit's decision in *Russell*, and the Fourth Circuit's decision in *Hill* are at opposite ends of the spectrum is also questionable. *BCI*, 450 F.3d at 486-87. Both of the courts in *Hill* and *Russell* rely on this Court's decision in *Reeves* and both hold the determinative issue is whether there is evidence that the biased subordinate was "principally responsible" for the employment decision. *Russell*, 235 F.3d at 226, 228; *Hill*, 354 F.3d at 291.

While some lower appellate courts have construed the *BCI* decision as creating yet another standard, *see Foroozesh v. Lockheed Martin Operations Support, Inc.*, 2006 WL 2924789 (W.D. Pa. October 10, 2006) and *Harding v. Cianbro Corp.*, 2007 WL 1290910 (D. Me. May 2, 2007), the *BCI* court merely recognized the standard that has been expressly or implictly stated by the courts before it - whether the biased supervisor's "actions caused [or resulted in] the adverse employment action". *BCI*, 450 F.3d at 487 (*citing Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (C.A.7 2004). In fact, the Tenth Circuit subsequently utilized the "cat's paw" causal analysis in *Young v. Dillon Companies, Inc.*, 468 F.3d 1243, 1253 (C.A.10 2006) when it noted that a biased investigator can issue reports and recommendations and "thereby cause decision makers who rely on those reports to fire an employee unlawfully - a situation in which the biased investigator uses the supervisor as a cat's paw to effect his or her own biased designs."

The Seventh Circuit's analysis is consistent with the "results in" approach utilized by this Court and its sister

circuits. In what has been described as a seminal case, the Seventh Circuit, in *Shager*, described the "cat's paw" theory. 913 F.2d at 405. There, the evidence showed the biased supervisor assigned the plaintiff an unpromising sales territory and portrayed his performance to the decision-making committee in the worst possible light. Applying agency principles, the court noted that if the committee fired the plaintiff for "reasons untainted by any prejudice" of the biased supervisor, the *"causal* link" between the prejudice and the employment action would be broke. *Id.* (emphasis added). The court concluded summary judgment could not be sustained because the supervisor's influence may have been decisive and the committee's deliberations were perfunctory. *Id.*

The "results in" or "causal link" approach in *Shager* has been consistently followed by the Seventh Circuit. In *Hunt v. City of Markham, Ill.*, 219 F.3d 649 (C.A.7 2000), the issue was whether there was evidence of discrimination when a biased black mayor made employment related recommendations to the unbiased decision-making city council. The court concluded it was possible to infer from the evidence of the mayor's recommendations that the decision-makers were influenced by unlawful discrimination in making their adverse employment decisions. *Id.* at 652.

The Seventh Circuit again recognized the need for a causal link in *Rozskowiak v. Village of Arlington Heights*, 415 F.3d 608 (C.A.7 2005), stating "[d]iscriminatory remarks are actionable only if they injure the plaintiff; 'there must be a real link between the bigotry and an adverse employment action.'" *Id.* at 612 (*quoting Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 762 (C.A.7 2001)). Unlike the facts in *Hunt*, there was no causal link between the discriminatory statements made by the allegedly biased police commander and the adverse employment action. The biased commander was one of a seven member Command Staff that advised the decision-maker

Chief by consensus. There were several occasions when the Command Staff did not adopt the biased commander's recommendations and there was no evidence that the decision-maker Chief met alone with the biased commander to discuss the plaintiff. Under these facts, the Seventh Circuit distinguished *Hunt,* noting the commander "did not have the singular influence over decision makers that the mayor in *Hunt* had..." *Id.* at 613.

The causal approach was again followed by the Seventh Circuit's decision in *Brewer*, wherein it concluded there is no causal link between a supervisor's bias and an adverse employment action when the decision-maker's decision was made after an independent investigation. (App. at 25a-26a). In particular, the court in *Brewer* recognized that an employer will not be liable when the decision-maker "is not wholly dependent on a single source of information [from the biased supervisor], but instead conducts its own investigation into the facts relevant to the decision." (App. at 23a). In such case, "the employer is not liable for [a biased supervisor's] submission of information to the decision-maker." *Id.*

In reaching its conclusion, the court discussed *dicta* from other Seventh Circuit cases noting "our approach to Title VII cases involving an employee's influence over a decision-maker has not always been completely clear." (App. at 26a) It concluded that:

> Even if we were to assume that a lesser degree of influence over an employment decision might trigger Title VII liability in other contexts, such as the context of a regularized, formal performance evaluation, we do not think that such an approach can affect the outcome in a case like this that concerns an employee's discipline for particular misconduct. *The line of*

> *cases addressing this particular situation is univocal, and indicates that even where a biased employee may have leveled false charges of misconduct against the plaintiff, the employer does not face Title VII liability so long as the decision maker independently investigates the claims before acting.*

(App. at 27a)(emphasis added).

In his attempt to create a conflict out of the *Brewer* decision, Petitioner places significant focus on the court's use of the phrases "singular influence" and "functional decision-maker". Petitioner erroneously contends "the Seventh Circuit's articulation of a 'singular influence' test differs from the standards expressed by the majority of courts because it rejects liability even when a biased intermediate supervisor directly influenced or effectively caused an adverse employment decision." *See* Pet. Brief, page 16. Petitioner fails, however, to consider the *Brewer* court's further explanation of a "functional decision-maker", which exemplifies an "influence" or "causation" approach:

> A good example of such degree of influence...is where the party nominally responsible for a decision is, by virtue of her role in the company, totally dependent on another employee to supply the information on which to base that decision. In such a case the employee that selects, colors and supplies the information has such power over the nominal decision-maker that she is in fact the true, functional decision-maker.

(App. at 22a). Further evidence of the *Brewer* court's causal approach is its citation to *Little v. Ill. Dept. of Revenue*, 369

F.3d 1007, 1015 (C.A.7 2004) for the proposition that a employee must possess so much influence "as to basically be herself the true 'functional...decision-maker'". The Seventh Circuit's decision in *Little* makes clear that a "functional decision-maker" is an employee that was responsible for, or caused, the employment action. 369 F.3d at 1015 (*citing* and *quoting Rogers v. City of Chicago*, 320 F.3d 748, 750, 754 (C.A.7 2003)(stating that "[a] decision-maker is the person responsible for the contested decision"); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (C.A.7 1997)(reasoning that a formally subordinate employee should be treated as the decision-maker where he "is the real cause of the adverse employment action"); *see also Hill*, 354 F.3d at 291 (holding that a decision-maker is "the one principally responsible for the decision or the actual decision-maker for the employer")).

Petitioner further ignores the fact that the *Brewer* court's analysis was premised on the question of whether allegedly biased supervisor had the "'singular influence' *required by Rozkowiak.*" (App. at 22a) (emphasis added). As reflected above, the court in *Rozkowiak* required an unbroken chain of causation between the biased supervisor's act and the adverse employment action. *Rozkowiak*, 415 F.3d at 612 ("there must be a real link between the bigotry and the adverse employment action"). The court in *Rozkowiak* recognized there was no causal link when the biased supervisor was one of a seven member committee that voted by consensus and *Brewer* likewise recognized there was no causal link when the decision-maker conducted an independent investigation.[6]

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[6] Petitioner contends the "Seventh Circuit held, however, that an employer is never liable when the nominal decision-maker consults any other source before making the adverse employment decision." (*See* Pet. Brief, page 12). The court only held that "the employer is not liable for an

Most notably, Petitioner focuses on the *dicta* in *Brewer* and disregards the court's ultimate conclusion - that any causal link between Thompson's alleged conduct and the employment action was cut off because Hendricks performed an independent investigation. (App. at 25a-26a).

Petitioner, in short, concedes it is "possible to reconcile" his cited cases and the formulations that he characterizes as the "influence" and "causation" standards. *See* Pet. Brief, page 23. His attempt to create a conflict on the basis that there is some separate and independent "actual decision-maker" standard in the Fourth and Seventh Circuits raises a distinction for which there is no difference. All of the Circuits have applied a "results in" approach for determining whether an employer should be liable for a supervisor's discriminatory animus and Petitioner's Petition should be denied.

II. In any event, this case is not a proper vehicle for considering that issue because resolution of that issue would not alter the outcome.

Assuming, *arguendo*, that a different "standard" were applied in this case, the outcome would still be the same because Hendrick's independent evaluation broke any causal link between Thompson's alleged bias and the adverse employment action. Accordingly, this case presents a poor vehicle for considering the legal question posed in the Petition, since resolution of that issue is unlikely to alter the outcome of this case.

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employee's submission of misinformation to the decision maker" when it "conducts its own investigation into the facts relevant to the decision". (App. at 23a).

Courts agree that an employer will not be liable for a biased supervisor's conduct when a non-biased decision-maker conducts an independent investigation before making an adverse decision. *See, e.g., Collins v. New York City Transit Authority*, 305 F.3d 113, 119 (C.A.2 2002)(no inference of discrimination where arbitration board made an independent inquiry); *Hill*, 354 F.3d at 297, *Long*, 88 F.3d at 306-07; *Wilson*, 952 F.2d at 946(biased supervisor was not the cause of plaintiff's discharge because the decision was based upon an independent investigation); *Brewer*, 479 F.3d at 918; *Lacks*, 147 F.3d at 725 (finding cat's paw theory was not applicable when the board made an independent determination that the plaintiff should be fired); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (C.A. 9 2003); *BCI*, 450 F.3d at 486 (employer may escape liability by performing independent investigation); *Llampallas*, 163 F.3d at 1249 (causal link broken because decision-maker made an independent investigation).

The facts are undisputed in this case that Thompson merely relayed information that she had received from Parking Services to Hendricks. Thompson did not make any recommendation to Hendricks and Hendricks did not discuss her decision with Thompson. Moreover, Hendricks conducted her own review of the matter before she, alone, made the decision to terminate the Petitioner's assistantship one month early. Under these facts, Hendricks' independent investigation, her independent decision to take the employment action, and Petitioner's admission that he had altered the parking tag and understood what he did was wrong, severed any causal link between Thompson's relaying of information and the adverse employment action that was taken.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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